Unbelievable, Inc., d/b/a Frontier Hotel & Casino *and* Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO. Cases 28–CA–10027, 28–CA–10425, 28–CA–10539, and 28–CA–10572

December 7, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 19, 1991, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge's ruling that the Respondent's contention that the unit described in the collective-bargaining agreement includes supervisors and is therefore inappropriate is irrelevant for the purposes of finding and remedying the violations in this case, and with the judge's refusal to permit the Respondent to adduce evidence on that issue. We note that at the hearing, the General Counsel amended the complaints in Cases 28–CA–10027 and 28–CA–10572 so that all four of the complaints alleged that the appropriate unit is as described in the agreement, ''but excluding supervisors as defined in the Act.'' Moreover, even if the contract unit had been alleged, the Board has found that where, as in the circumstances here, parties have voluntarily included supervisors in a unit the Board will order the application of the terms of a collective-bargaining agreement to those supervisors. *Union Plaza Hotel & Casino*, 296 NLRB 918 (1989), enfd. sub nom. *E.G. & H. v. NLRB*, 949 F.2d 490 (9th Cir. 1991).[2]

In adopting the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) by unilaterally discontinuing its contributions to the pension fund, we agree with his finding that the Respondent's February 5, 1990 ''last, best and final'' proposal and its February 23, 1990 implementation notice did not include changes in the pension plan. Attorney Efroymson, who represented the Respondent in negotiations, testified that if an article of the expired agreement was not being changed it was not contained in the implementation letter. We note that article 27, Pensions, was not included in the implementation notice, and that the Respondent's final proposal states that no change in that article was proposed.

In excepting to the judge's finding that the Respondent did not notify the Union that the pension plan was being discontinued, the Respondent also relied on a May 10, 1990 letter from Keiler to the Union, which was stipulated into the record. The letter stated that the Respondent intended to cease payments to the plan as of June 2, 1990. The Respondent contends that the Union failed to request bargaining in response to this letter and thereby waived its right to bargain over the Respondent's proposed change. We note, however, that the Union responded to Keiler's letter in a May 24, 1990 letter, also stipulated into the record, which stated that the Union had not been advised that Keiler represented the Respondent, and that the Union would respond to his letter if it received such notification. Keiler testified that he did not respond to the Union's letter. Moreover, although Keiler testified that the Respondent's owners had informed the Union in March that he was representing the Respondent, he also testified that he was not present when such notice was given and did not know how it happened. Other than this testimony by Keiler, there is no evidence in the record regarding the asserted waiver of bargaining by the Union. Under these circumstances, we find that the Respondent has not established a clear and unmistakable waiver by the Union of the right to bargain about this change in terms and conditions of employment.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondent also contends that the judge's rulings, findings of fact, and credibility resolutions are the result of bias against the Respondent. After a careful review of the record, we are satisfied that this allegation is without merit.

In agreeing with the judge that the Respondent unilaterally promulgated new disciplinary rules in violation of Sec. 8(a)(5) and (1), we note that, although the record does not definitively identify all of the rules in effect prior to the distribution of the July 1, 1990 rules, the Respondent's counsel, Keiler, testified that a document entitled ''Frontier Hotel Rules'' and dated December 1, 1989, constituted at least some of the old rules. Consistent with the judge's conclusion, we find that the rules contained in that document are different from the July 1, 1990 rules. Further, we note that Keiler testified that he did not bargain with the Union about the new rules, and Personnel Director Patton testified that he did not mail a copy of them to the Union.

We note that the judge inadvertently misspelled the name of Security Chief Michael Klug.

[2] Member Oviatt finds *Union Plaza* to be distinguishable from the instant case. He would not, in any event, address the question of the effect of the parties voluntarily including supervisors in the contractual unit because, in his view, its resolution is unnecessary to the disposition of this case.

See generally *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Unbelievable, Inc., d/b/a Frontier Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Lewis S. Harris, Esq., for the General Counsel.
Joel I. Keiler, Esq. (Ammerman & Keiler), of Reston, Virginia, for the Respondent.
Barry S. Jellison, Esq. (Davis, Cowell & Bowe), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried before me in Las Vegas, Nevada, on March 12, 14 and 15, 1991, on consolidated complaints issued by the Regional Director for Region 28 of the National Labor Relations Board on December 29, 1989, September 7, November 15, and December 28, 1990. The complaints are based upon charges filed by the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO (the Union) on November 16, 1989, July 17, October 4, and October 23, 1990. Two of the charges were subsequently amended. They allege that Unbelievable, Inc., d/b/a Frontier Hotel & Casino (Respondent) has committed certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act.

Issues

The principal issue to be decided is whether Respondent unlawfully unilaterally changed certain terms and conditions of employment. Specifically, the complaint alleges that Respondent, without notice to the Union, made various disciplinary rule changes, rescinded the contractual right of union representatives from access to the employees it represents, changed the rules regarding hiring and transferring employees and ceased making payments to the pension plan. In addition, there is the question regarding whether or not Respondent unlawfully spied upon its employees as they conferred with their union representatives. Respondent denies few of the facts and offers, instead, the defense that these changes were permitted by circumstances such as past practice, bargaining impasse, breach of contract by the Union and necessity.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. All parties have filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Unbelievable, Inc., d/b/a Frontier Hotel & Casino, a Nevada corporation, operates a hotel and gaming casino at its facility in Las Vegas, where its annual gross revenue exceeds $500,000 and it annually purchases and receives goods in interstate commerce valued in excess of $50,000. Accordingly, Respondent admits and I find it to be an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a hotel and casino located on the ''Strip'' in Las Vegas. Until 1988 it was owned by the Summa Corporation. Summa had a collective-bargaining agreement with a number of unions including the Charging Party. The last collective-bargaining agreement between the Hotel and the Union was a 5-year agreement whose term was from May 4, 1984, to June 1, 1989. In general, it covered cooks and miscellaneous kitchen help, dining room personnel, bartenders, the bell desk and the housekeeping employees. These are the types of employees usually found in hotels and hotel-restaurant facilities. At the time Respondent took over the hotel and casino on July 1, 1988, it specifically agreed to adopt the collective-bargaining contract and continued to operate under its terms until it expired on June 1, 1989. Indeed, it concedes operating under the terms set forth in that contract until February 26, 1990, when it imposed the terms of a so-called last offer.

In general, the complaints allege that Respondent has made certain unlawful unilateral changes either during implementation of the last offer or somewhat later.

B. *Preliminary Observation Regarding Respondent's Defense That the Bargaining Unit is Inappropriate*

Respondent has consistently, and persistently, maintained that because the bargaining unit found in the expired contract covered statutory supervisors, that it is in fact an inappropriate unit. That circumstance, it further argues, allows it to decline to bargain with the Union until such time as the bargaining unit is rendered appropriate. During the hearing it regularly sought to adduce evidence that certain job classifications covered by the expired contract were supervisory in nature. I declined to hear evidence on the point, regarding the issue as not relevant to the proceedings as framed by the complaint.

It is true, as in most 8(a)(5) cases, that the complaints contain unit description clauses; it is also true that some of them were later amended to clearly exclude supervisors. Despite that, the remainder of the complaints attack only issues involving unilateral changes of terms and conditions of employment. None of the issues raised by the complaints actually deals with Respondent's affirmative good faith duty to bargain in good faith over a new collective-bargaining con-

tract; nor is there an issue over what the bargaining unit was at the time the unilateral changes occurred.

The bargaining unit extant at the time the alleged unlawful unilateral changes were imposed was that set forth in the expired collective-bargaining contract, one which Respondent voluntarily adopted when it purchased the hotel and casino. The Board has said in such circumstances, *Cardox Div. of Chemetron Corp*., 258 NLRB 1202, 1203 (1981):[1]

> Having voluntarily recognized and bargained with the Union as the collective-bargaining representative of a unit composed of [individuals who alone would not have constituted an appropriate unit under Section 9], Respondent argued for the first time at the hearing . . . that the unit is inappropriate because the employees lack a distinct community of interest. We reject this belated attempt to repudiate the voluntary recognition.[4] A contrary holding would fly in the face of our statutory obligation to promote stability in bargaining relationships.

[4] *Berbiglia, Inc*., 233 NLRB 1476, 1494 (1977).

Clearly, the Board will not permit the disruption of an otherwise stable bargaining relationship through the unilateral declaration by an employer that because the Board would not have initially certified the unit, it has no obligation to bargain in it where bargaining has been successful for many years.[2] It is quite obvious that the Frontier Hotel & Casino has bargained with the Union in the unit described by the expired contract for many years and for many contract terms. Indeed, Respondent found the unit sufficiently appropriate when it adopted the contract upon the purchase of the facility.

This, of course, does not mean that Respondent cannot seek to modify the collective-bargaining unit to comport with the statute. It may timely file a unit clarification petition or negotiate with the Union to obtain such changes. If it chooses the latter, however, it must bear in mind that unit description clauses are nonmandatory subjects of bargaining and not subject to impasse privileges. See *New York Times Co*., 270 NLRB 1267, 1273 (1984).

Accordingly, even though the contract may have expired at the time the unilateral changes were made, and even if Respondent was entitled to seek a change in the bargaining unit, its purported inappropriateness would not constitute a defense to a unilateral change. Indeed, until the Board changes the unit or until the parties agree to change it, it is, and has been, a demonstrated unit appropriate for collective bargaining. Therefore, I concluded at the hearing that the evidence bearing on the supervisory status of some of the unit members was not relevant to the case and barred it. I adhere to that ruling now, and comment only that the issue appears to be a red herring. It is of no concern to the outcome of the case. It does not even bear on the remedy, for bargaining unit members are entitled to any remedy appropriate to the unfair labor practices found and, here at least, the Board will not be issuing a general bargaining order. This observation, of course, does not preclude cease-and-desist orders, rescission orders, or make-whole orders.

[1] Enf. denied 699 F.2d 148, 156 (3d Cir. 1983). Although the court denied enforcement on the facts, it recognized the general rule.

[2] See also *Carolina Telephone & Telegraph Co*., 258 NLRB 1387, 1388 (1981).

C. *The Unilateral Changes*

1. The expulsion of union representatives from the premises

Article IV of the expired collective-bargaining contract permitted union officials access to the hotel for the purpose of communicating with its members. The text of the clause is set forth in the footnote below.[3]

Although the language of article IV is clearly broad enough to cover areas other than breakrooms, union officials visiting the premises generally met employees at a breakroom known as the Helps' Hall. The Helps' Hall is an employee lunchroom not open to the general public. Also located adjacent to that room is the security office. Exercising their contractual right to provide union representatives on site, the union officials assigned to the Hotel would first go to the security office, obtain a badge and then sit in the Helps' Hall or, occasionally go to other locations within the hotel to perform their duties. On those latter visits, disagreements sometimes arose regarding whether or not a union official was exceeding the contracted-for bounds of conduct, perhaps by interfering with an employee who was on duty. Respondent believes it has the authority in those situations to expel the union official from the premises on a permanent basis. Such expulsions are known as ''86ing.''

On October 20, 1989, Union Business Agent Roxanna Tynan was 86ed by Respondent's security chief, Michael Kluge. Kluge's decision, however, had been preceded by a few days with an incident between Security Officer Gregg Franklin and Tynan. Franklin testified that he had seen Tynan speaking to a kitchen steward named George Morris. He says he had observed the two conversing on a porch outside the building in a nonwork area. He assumed, without really knowing, that Morris was on duty. Tynan, however, had assumed that Morris was off duty since he had come outside the building to speak to her. She regarded herself as being in a proper area to speak to employees. Franklin told Tynan that she was to speak to employees only if they were on break or in an appropriate break area such as the Helps' Hall. She told him she would take his opinion into account. He said he recalled the incident pretty well because he ''wrote up'' the employee, Morris, who was outside his work area. Franklin says that he later conferred with Morris' supervisor to determine whether that was so or not.[4]

[3] The text of the clause reads:

> Article IV. Union Representatives. Authorized representatives of the Union shall be permitted to visit the Employer's establishment to see that this Agreement is being enforced and to collect union dues, assessments and initiation fees, provided that such visits by Union representatives shall not interfere with the conduct of the Employer's business or with the performance of work by employees during their working hours. Union representatives may be required to wear identification badges in non-public areas.

[4] It should be observed here, that it is unlikely that it is Franklin's obligation to ''write up'' an employee who was outside his work area. That seems to me more to be the duty of the immediate supervisor. In any event there is no suggestion that Morris actually was on duty at the time he spoke to Tynan. Even if he was, Tynan had

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This incident was followed on October 20 by Kluge 86ing Tynan for a conversation she was having with employees in the Helps' Hall. Tynan testified that on October 20 she had been in and out of the Helps' Hall during the day speaking to employees. On her attempt to return in the afternoon Kluge advised her that she had been 86ed and she was to leave the premises. When she asked why, he simply cited article IV, declining to be more specific. When she asked for documentation supporting his decision, he told her to take it up with the legal department.

Kluge testified that on that day he had received word from a shift supervisor that there was some sort of ''commotion'' occurring in the Helps' Hall and that he and another security officer, Yesko, had gone to the Helps' Hall in response. He agrees that he found no commotion occurring but did observe Tynan speaking with some employees at a table, apparently a waitress and a bartender. He and Yesko sat a few tables away and listened to the conversation. During that time he heard Tynan refer to Respondent's general manager, Tommy Elardi, as a ''snake in the grass,'' a ''liar'' and an ''asshole.'' During the conversation Tynan supposedly told the employees that the Company was in a financial bind and it was a good time to ''bring them to their knees.''

Upon hearing these things, Kluge says he consulted with Company Attorney Cohn. Afterwards, as Tynan was leaving the facility he told her she was being 86ed. He says he read her the state trespass act. He also says he cited article IV of the contract.[5]

On November 22, 1989, John Patton, Respondent's personnel director, 86ed Business Agent Michelle Vieira. Vieira was unable to testify at the hearing, having just given birth to a child. Patton agreed that he gave Vieira no reason for 86ing her and explained to me that he had done it simply because Respondent was ''just taking a hard stand.''

There was no further 86ing for almost a year. On September 20, 1990, the Union had selected three individuals to service Respondent's employees. These were Kevin Kline, Hattie Canty, and Geoconda Espinosa. All three had special attributes. Kline was an experienced business agent who had worked for a long period of time for a local in Washington, D.C., and was currently on the International's staff; he had been lent to Respondent when it became apparent that bargaining was becoming difficult. Canty was the recently elected president of the Charging Party. Espinosa, although inexperienced as a union representative, spoke fluent Spanish, an attribute which enabled her to speak easily with Respondent's Hispanic employees, of which there is a large number.

Shortly thereafter, the Union's administrative assistant, Johnny LaVoie, gave all three letters of introduction to Patton.[6] All three promptly met with Patton, delivered the letters and told him they were there to deal with grievances, collect dues, and engage in a membership drive. Patton says he doesn't recall a reference to any membership drive. At one point, Kline showed Patton a bank draft which the Union hoped to persuade employees to sign to assist the Union in collecting dues more easily.

Within a week, by letter dated September 27, 1990, Patton 86ed Kline on the basis that Patton had learned that Kline ''is an employee of the Hotel and Restaurant International Union.'' At the hearing Patton admitted that Kline was 86ed ''solely'' because he was a representative of the International Union.

On October 22, 1990, Canty was 86ed. She had been visiting the Helps' Hall during the day performing her duties. At some point she sat with two employees, Eileen Crossland and Barbara Thomas. Crossland made two reports, one on October 22 and the other on October 23, regarding what she perceived to be misconduct by Canty and Espinosa. As a result of those reports Patton caused Canty to be 86ed. He later relied on the second report to assist him in deciding to 86 Espinosa as well.

Crossland's reports are, to say the least, unremarkable. She apparently did not know Canty's name and referred to her only as a ''black lady.'' In pertinent part, the report follows:

> A black lady sat down & was asking how to pronounce my name.[7] She asked how long I had worked. I answered 16 yrs. The black lady asked my last name. I answered that I don't wish to give it as I am not interested in the Union. I told the black lady that I don't want to talk to you. Black lady asked if I was happy with the insurance & medical coverage. I answered that I was happy with what I have. I am still not in talking with you. Black lady said that she had the authority to talk to anyone at anytime that she wanted. I told her that she didn't have the right to harass me.
>
> I then got up & picked up my food, moving to another table. As I left she says that okay I talk with her[,] the bus person.
>
> As I left I told the black lady I thought what the Union was doing was a disgrace for allowing this to go on.

On the following day Crossland gave her second report, this time dealing with Espinosa. This one is even shorter:

> I was sitting alone having my lunch when a lady I.D.ing herself as a union representative sat down. I told her I didn't want to talk to her. She asked why not. I explain to her I had been harass by a union representative the day before & did not have anything to say to her. I asked to please leave me alone. She said that I had the right to talk to you or anyone else as she wanted. At this point I got up and left. Leaving my lunch 1/2 finished.

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no way of knowing that. She obviously did not seek him out since she was standing on the porch outside the building and his duties were in the kitchen. To the extent Franklin or other of Respondent's officials regarded Tynan as in breach of art. IV, they have overreached.

[5] To corroborate Kluge, Respondent called employees Lynette Thorne and Betsey Bracken. Neither of them was a bargaining unit employee but they testified that they had overheard Tynan make similar remarks at other times in the Helps Hall. Their testimony is not particularly weighty although it does show that Tynan may have been making such remarks. Even so, Kluge only relied on what he himself had overheard.

[6] LaVoie is the administrative assistant to the Union's secretary-treasurer, Jim Arnold. The secretary-treasurer is the chief executive officer of the Union.

[7] Canty could read Crossland's first name from her employee name tag.

Although neither Canty or Espinosa adopts Crossland's reports, their testimony is not greatly different. Canty simply says that her question to Crossland regarding the pronunciation of her first name was a means of breaking the ice between the two; she has a friend with the same first name but who pronounces it slightly differently. Both Canty and Espinosa say they did nothing which would constitute harassment under any definition.

When Canty returned to the hotel later that afternoon, she was denied access and was given a letter from Patton stating that she was being 86ed because she had ''harassed'' employees on break and that was prohibited by article IV of the contract. Patton made no effort to discuss the incident with Canty before issuing her the letter.

Patton also used Crossland's second report to justify 86ing Espinosa. He did so by letter dated October 25, 1990, accusing her of harassing employees who were on break and conducting union business outside the scope of the Culinary contract, citing article IV.

At the hearing Respondent added another incident to justify its action. That appears to have occurred outside the building several days before. Espinosa says an employee named Lily Martinez had agreed to meet her after work at a bench located outside the employee entrance next to the parking lot in order to pay dues. They met as planned and, as they talked, they were approached by security guard Kirk Leuthy. She says Leuthy knew her by sight, if not by name, due to her numerous visits to the hotel. Nonetheless, he asked her for some identification. When she replied she was a union business representative, he asked her for her badge. She replied that she was not in the building and therefore did not have to have a badge.[8] Leuthy persisted in demanding identification, so they walked to her car which was parked nearby, to obtain her driver's license. After looking at it, Leuthy wrote her name down and told her to leave the premises because she was parked in an unauthorized zone.

Leuthy's version of the incident is far more graphic. He says he and another guard had been notified by radio that there was a disturbance at the stairway between the time office and the parking lot. He says when he arrived, he observed Espinosa blocking the stairway and preventing individuals from either coming down or going up. His testimony was a bit confused on the point. He first testified that she was blocking four or five people who were coming down the stairway, but conceded that they might have been talking to her. Nonetheless, he says there were individuals trying to enter the building on the other side of the stairway and who were impeded from doing so. Accordingly, he says he asked Espinosa to step away from the stairway. When she did so, their conversation began.

He contends that he had never seen Espinosa before, so he asked her for her identification. She replied she was a union business agent and he again asked for identification. At that point he says that she became rude and obscene. In contrast, he volunteered he was ''gracious'' toward her. His testimony is somewhat inconsistent, however, because he asserts that at one point she was removed because she did not have proper identification, i.e., the badge, at another he asserted he asked her to leave because she was parked in an unauthorized area. Later he conceded that she wasn't required to have a badge in the parking lot.

It is clear to me based upon Leuthy's demeanor that he is a self-important exaggerator. Even by his own subjective description, there was no disturbance occurring at the location. Even if his version is believed, i.e., that Espinosa was somehow blocking the stairway, nothing occurred which warranted ejecting her from the premises. All he needed to do was to ask her to move. However, I do not credit his version. Espinosa is of slight stature and even if the stairway is as narrow as Leuthy says, she would not have been able to block both sides of it. Moreover, by his own testimony it seems likely that she was not blocking the stairway but speaking to a group of people who had no objection. In fact, Leuthy moved so quickly, according to his own version, that he did not take sufficient time to observe what was actually occurring. He did not listen to any of her words nor to the words of any of the others who were there. Therefore, it is clear that Leuthy reached his conclusions more quickly that the facts presented themselves. Frankly, I find Leuthy's version not to be worthy of belief. But even if believed, it was it does not amount to anything warranting discipline.[9]

Patton testified, however, that he took the incident into account together with Crossland's report and decided to 86 Espinosa as well. As he testified, he ''thought it best to take a hard stand in 86ing the agents.''

Article IV of the collective-bargaining contract is clearly a bargained-for accommodation between Respondent's property right to control access to the property by nonemployee, noncustomers, and the right of employees who have chosen a union representative to have those union representatives visit them on the premises in order to perform the business of union representation. The clause specifically includes the explicit right to observe the premises to determine whether the agreement is being followed and to collect dues and initiation fees, so long as the union officials do not interfere with the Employer's business or with the performance of work by the employees.

None of the incidents cited by Respondent demonstrates that the Union had breached this rule. The only suggestion that there may have been a breach is Kline's testimony that he told Patton he was present in order to conduct a membership drive. But even a membership drive is permitted by this clause for it specifically authorizes the Union to collect initiation fees, i.e., obtain memberships. There is absolutely no evidence that any union business agent ever spoke to an employee who was on duty, security guard Franklin's testimony notwithstanding, and there is no evidence that any union representative interfered with the Employer's business or with the performance of any employee's work.

It may be true that Tynan made insulting remarks about members of the Elardi family in the Helps' Hall. Even so that is not a breach of article IV. She did it at a time when employees were on break, at a location where they were to take their breaks, and did it in private conversations with her members or prospective members. This clause clearly per-

[8] It should be noted here that in order to obtain the badge, a union representative must present himself or herself at the security office inside the building.

[9] His accusation that she used abusive language to him is rejected. Leuthy is a huge, intimidating young man. Espinosa is a slight, shy young woman who speaks English as a second language. She would not risk the anger such language would be likely to provoke, even if she was proficient with such epithets.

mitted the union business agents to conduct union business at the Hotel so long as the Hotel's business was not disrupted.[10] Furthermore, it is quite clear that Respondent had no basis for 86ing Kline whatsoever, except for his being directly employed by the Union's parent International union. It has long been the law that a union is entitled to select whomever it wishes to represent it without legal objection by the employer.[11] Furthermore, Respondent's reliance on the statements of Crossland is clearly misplaced. Crossland has described nothing which constitutes harassment or which was disruptive. It is clear from Crossland's own statements that she overreacted to Canty's and Espinosa's approaches. Even if both said, as Crossland seems to say, that they had right to speak to employees, all Crossland had to do to avoid it is exactly what she did; walk away. Clearly Crossland was being overly sensitive and it is clear that Respondent knew or should have known that was the case. Certainly nothing which she said in her statements constitutes grounds for 86ing either business representative.

Since Respondent has presented no credible evidence that any business representative ever breached article IV, and since the expulsion of these individuals was based on no grounds or flimsy grounds, one can only conclude that the reason these individuals were ejected from the hotel was to somehow inhibit the Union from communicating with its membership and/or the people it is legally obligated to represent. Furthermore, it appears that some of the confrontations occurred in the presence of employees. That is certainly true of the Espinosa incident in the parking lot, Franklin's statement to Tynan that she could only speak to employees in the Helps' Hall, and the surveillance of Tynan and Espinosa while they conversed with employees. This conduct either had the indirect impact of interfering with union-related communications (which may have had bargaining aspect to it) or was a direct coercion and restrain of employees who were engaging in the union activity of conversing with their bargaining representative. Either way it violated Section 8(a)(1) of the Act. *Harvey's Wagon Wheel*, 236 NLRB 1670 (1978). To the extent that it deprived employees of their contractually granted access to their bargaining representative, it was a unilateral change of a material term or condition of employment and therefore a breach of Section 8(a)(5); it likewise tended to interfere the representational process, also a breach of Section 8(a)(5). *Boyer Bros.*, 217 NLRB 342 (1975); *Precision Anodizing & Plating*, 244 NLRB 846 (1979); cf. *Westinghouse Electric Corp.*, 243 NLRB 306 (1979). Furthermore, that term and condition of employment survives the expiration of the contract. *Houston Coca-Cola Bottling Co.*, 265 NLRB 766, 777 (1982), enfd. as modified 740 F.2d 398 (5th Cir. 1984); *American Commercial Lines*, 291 NLRB 1066, 1072 (1988).

[10] It may be true that she referred to the possibility that union members may be asked to support a strike at another hotel, Fitzgerald's. Again, there is nothing in art. IV that prohibits her from doing so. Certainly Respondent never cited that as one of the reasons to 86 her. At one point, Patton said that Tynan and Vieira passed out leaflets in the Helps' Hall. He believes that such conduct violates art. IV, but was unable to say how. The leaflet basically informs the union membership of the strike about to begin at Fitzgerald's. It has little, if any, likelihood, of affecting employees' work at Respondent.

[11] *Kentucky Utilities Co.*, 76 NLRB 845, 846–847 (1948), enfd. as modified 182 F.2d 810 (6th Cir. 1950); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976); *General Electric Co. v. NLRB*, 412 F.2d 512, 517 (9th Cir. 1969). There are some exceptions, but none of them are applicable here.

2. House disciplinary rules

On July 1, 1990, Respondent issued a set of rules to all employees. These rules covered many aspects of employee behavior and performance. In total there were 63 specific rules. They were headed by the statement ''Employees violating one or more of these rules or procedures shall be subject to immediate discipline up to and including termination.'' Furthermore, they were not all inclusive for it stated that each department may impose additional rules. Beyond the list of 63, an additional 4 rules were attached covering, among other things, a hiring policy dealing with nepotism, a transfer policy requiring Elardi family approval if an employee was switched from one department to another, and a rehire policy stating that an individual who left employment would be ineligible for rehire for 6 months. Respondent asserts that it was privileged to impose these rules principally because similar rules had been in effect before that time. Clearly, however, none of the hiring, transfer and rehire policies had been in effect before. These were new rules.

Furthermore, although some of the 63 behavior rules may have been similar or covered the same conduct as previous rules, it is quite clear at least rules 12, 13, 40, 42, and 48 were significantly different from any of the rules which had preceded them. Furthermore, Respondent's witness, its attorney, Joel I. Keiler, gave testimony about these changes which suggests a disregard for historical accuracy.

Keiler first testified that he had compared the new rules with the old rules in order to reach the conclusions that they were pretty much the same. He made that argument to the Regional Office during the investigation and subsequently testified to it before me. However, on cross-examination he was forced to concede that the old rules which he was comparing were rules which had been promulgated by a totally different hotel, unrelated to Respondent, the Barbary Coast.[12] Clearly Keiler has, at the very least, dissembled during the investigation and has demonstrated an untoward recklessness regarding presenting accurate facts. As the record now stands, there is no evidence regarding the language of any of the previous rules. We only know the July 1, 1990 rules.

In any event, Keiler admitted that the new July 1, 1990 rules set forth in General Counsel's Exhibit 15 were never proposed to the Union and that Respondent never gave the Union an opportunity to bargain over them.

In that circumstance, it is clear that Respondent made significant and substantial changes regarding terms and conditions of employment in violation of Section 8(a)(5) and (1) of the Act. Before implementing such rule changes, an employer is obligated to give notice to the union in order to give the union an opportunity to bargain over them. Respondent did not do so and therefore violated the Act. *NLRB v. Katz*, 369 U.S. 736 (1962); *Boland Marine & Mfg. Co.*, 225 NLRB 824 (1976); *Great Western Produce*, 299 NLRB 1004 (1990).

[12] Keiler has represented the Barbary Coast in a separate proceeding before the Board.

3. The cessation of the pension fund contributions

The expired collective-bargaining agreement provided that Respondent make contributions to the Southern Nevada Culinary Workers and Bartenders Pension Fund. Contributions had been made on the 1984–1989 collective-bargaining contract during its life, both by Summa Corporation and by Respondent when it took over. Respondent continued to make contributions until June 1990. Indeed, in its February 5, 1990 ''last, best and final'' offer it proposed no changes in the pension plan. Similarly, in a subsequent proposal, dated February 23, 1990, Respondent omitted any reference to any changes in the pension plan. Its then attorney, Kevin Efroymson, testified that there was no reference to a change in the February 23 proposal and therefore Respondent intended to make no changes in the pension plan.

Consistent with that intent, when Respondent actually imposed its last offer on February 26, 1990, it made no changes in the pension plan or pension contributions. But, on June 25, it advised its employees that pension contributions were being discontinued. Payments ceased on that date and have not been resumed. Such failure is a violation of Section 8(a)(5) and (1). *Hen House Market #3*, 175 NLRB 576 (1969), enfd. 428 F.2d 133 (8th Cir. 1970).

Respondent defends on the ground that an impasse had been reached and that the implementation letter had canceled the pension. Clearly that is not the case. At no time until June did Respondent advise anyone that the pension plan was being discontinued. Even then it only advised the affected employees, not the Union. Furthermore, there is no evidence that a genuine impasse on that issue existed. At no time during bargaining was anyone contemplating changing the pension plan. Clearly this is not the implementation of a proposal after impasse as contemplated by *Taft Broadcasting Co*., 163 NLRB 475 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968), the seminal case on the issue.

Finally, as a rather lame justification, Attorney Keiler testified that he had a conversation with a trustee of the plan who had supposedly told him that the plan could not accept payments if a year had passed since the last collective-bargaining agreement had expired. Aside from the fact that such a statement is hearsay not probative of much, it is clear that such statement does not constitute the official position of the trust. The trust acts only through its board of trustees when serving as a Board. One trustee's statement does not constitute a statement of policy or practice. As an attorney, Keiler undoubtedly knows the basic tenet of trust law that a trust can only act at the behest of the Board. Single trustees have no such authority.[13] See Section 302(c) of the Act. Indeed, the official statement of the trust administrator would carry more weight than that of a single trustee. Since Keiler undoubtedly knows that, I can only conclude that his testimony is designed to obfuscate.

Accordingly, I am unable to find any justification for Respondent having discontinued paying the pension plan.

[13] *Scott on Trusts* (3d ed. 1967): ''§ 194. Several Trustees. Where there are two or more trustees, it is essential that they all concur in the exercise of powers conferred upon them. [fn. omitted]. In the case of charitable trusts, such unanimity of action is not required of the trustees; action by a majority is effective, as in the case of action by corporate directors. [Fn. omitted.]'' Also, *Survey of the Law of Trusts*, Smith (1949), § 14(e).

THE REMEDY

Having found Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1), I shall direct that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include an order requiring Respondent to make whole the pension trust for contributions not paid since May 1990 in accordance with the Board's decisions in *Ogle Protection Service*, 183 NLRB 682 (1970), and *Merryweather Optical Co*., 240 NLRB 1213 (1979). It shall also require rescission of the July 1, 1990 rules, the rescission of any discipline brought thereunder and, where appropriate, the reinstatement with backpay for any employee discharged or suspended due to enforcement of those rules, together with interest. See *Boland Marine & Mfg. Co*., supra; *Great Western Produce*, supra. The identity of the individuals so affected shall be determined at the compliance stage. Backpay for dischargees shall be calculated as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Suspended employees shall be made whole as if they had not been suspended, together with interest thereon. In addition, Respondent shall expunge their personnel files of any record of that discipline and notify the employees in writing that it has done so.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent's conduct in ejecting union representatives from its premises contrary to their contractual right to be on the premises violated the Act as follows:

(a) It deprived employees of access to their statutory collective-bargaining representative and thereby interfered with the employees' Section 7 right to union representation, a violation of Section 8(a)(1).

(b) It had the tendency of undermining the Union as the employee bargaining representative because the employees could no longer communicate as readily with their representatives and because it constituted direct interference with the Union's right to collect dues and initiation fees, thereby violating Section 8(a)(5) and (1).

(c) To the extent that ejection occurred within the view of statutory employees, the conduct disparaged and sought to discredit union representatives in the eyes of the employees, suggesting to them that union representation was not appropriate and could result in employees being treated in a similar negative manner, thereby violating Section 8(a)(1).

(d) It constituted a repudiation of a contract clause designed to protect the employees' Section 7 rights and thereby violated Section 8(a)(5) and (1).

(e) It constituted a unilateral change in material and substantial terms and conditions of employment in circumstances where Section 8(d) of the Act prohibits unilateral repudiation of collectively bargained terms and conditions and thereby violated Section 8(a)(5) and (1).

(4) Respondent violated Section 8(a)(1) by eavesdropping or otherwise watching employees as they had private conversations with their union representatives.

(5) Respondent violated Section 8(a)(5) and (1) by unilaterally imposing employee behavior and hiring rules without first giving the Union notice and an opportunity to bargain over them.

(6) Respondent violated Section 8(a)(5) and (1) by unilaterally and without notice to the Union ceasing to pay the pension plan contributions as mandated by Section 8(d).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Unbelievable, Inc., d/b/a Frontier Hotel & Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Ejecting union representatives from its premises contrary to their contractual right to be on the premises.

(b) Repudiating collective-bargaining contract clauses designed to protect the employees' Section 7 rights and unilaterally changing material and substantial terms and conditions of employment in circumstances where Section 8(d) of the Act prohibits such conduct.

(c) Eavesdropping or otherwise watching employees who are having private conversations with their union representatives.

(d) Unilaterally imposing employee behavior and hiring rules without first giving the Union notice and an opportunity to bargain over them.

(e) Unilaterally and without notice to the Union ceasing to pay the pension plan contributions mandated by Section 8(d).

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the employee behavior and hiring rules which it imposed on July 1, 1990, and rescind any disciplinary action which it has taken against employees for the breach thereof, including reinstating any employee discharged or suspended thereunder together with backpay and interest; notify the employees who were disciplined under the July 1, 1990 rules that we have removed from our files any reference to that discipline and that the discipline will not be used against them in any way.

(b) Pay to the Southern Nevada Culinary Workers and Bartenders Pension Fund those monies improperly withheld from it beginning in May 1990 and continue such payments thereafter until such time as Respondent negotiates in good faith with the Union to a new agreement or an impasse, together with any penalties or late fees the trust normally requires. *Merryweather Optical*, supra at 1216 fn. 7.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its hotel and casino in Las Vegas, Nevada, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT eject representatives of the Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO, from our premises contrary to their contractual right to be on the premises.

WE WILL NOT repudiate any collective-bargaining contract clauses designed to protect our employees' Section 7 rights and WE WILL NOT unilaterally change material and substantial terms and conditions of employment in circumstances where Section 8(d) of the Act prohibits such conduct.

WE WILL NOT eavesdrop or otherwise watch employees who are having private conversations with their union representatives.

WE WILL NOT unilaterally change our employee behavior and hiring rules without first giving the Local Joint Executive Board of Las Vegas notice and an opportunity to bargain over them.

WE WILL NOT unilaterally and without notice to the Local Joint Executive Board of Las Vegas cease to pay the Southern Nevada Culinary Workers and Bartenders Pension Fund pension plan contributions mandated by Section 8(d).

WE WILL NOT in any like or related manner interfer with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind the employee and hiring rules which we imposed on July 1, 1990, and WE WILL rescind any disciplinary action which we have taken against employees for breaching them, including reinstating any employee discharged or suspended under those rules together with backpay and interest.

WE WILL notify employees who were disciplined under the July 1, 1990 rules that we have removed from our files any reference to that discipline and that the discipline will not be used against them in any way.

WE WILL pay to the Southern Nevada Culinary Workers and Bartenders Pension Fund those monies improperly withheld from it beginning in May 1990 and thereafter.

UNBELIEVABLE, INC., D/B/A FRONTIER HOTEL & CASINO